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APR 11 2005

No. 04-603

IN THE

Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,
Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY TO BRIEF FOR RESPONDENT

A. Introduction.

The Respondent's Response Brief on the Merits has not accurately perceived the critical aspect in which The 6th Circuit departed from the standards set forth by *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L. Ed. 2d 650 (1986). Petitioner's state complaint closely follows virtually similar circumstances as in *Merrell Dow*. Under *Merrell Dow* substantial federal question jurisdiction is not available when there is no private right of action provided by Congress for relief of a violation of federal law as alleged in the complaint. Respondent seeks to deviate from the *Merrell Dow* rule and follow a line of cases that are at their nature are constitutional or conflict between federal statutes issues.

B. Recap of Question for Review.

Petitioner petitioned the Supreme Court for a writ of certiorari the Supreme Court to address two issues. The first issue addressed the federal court's jurisdiction and is as follows:

> "The question raised is, when there is a violation by the IRS of 26 U.S.C. §6335(a) by intentionally ignoring the prerequisite provision requiring personal service of notice of seizure before obtaining service by certified mail, whether the defendant in a state quiet title action can remove the action by claiming that the necessary interpretation of 26 U.S.C. §6335(a) as to whether strict compliance or substantial compliance with the statute constitutes a substantial federal question and creates original jurisdiction in the district court."

The Federal question issue is a result of both the District Court and the Sixth Circuit's failure to correctly apply the *Merrell*

Dow rule for original jurisdiction which resulted in the 6th Circuit establishing ruling that a mere violation of a federal law was sufficient to establish a substantial federal question thereby giving the federal court original jurisdiction. This is the only question this Court certified for review.

The second issue sought for review addressed the question of whether requirement in 26 U.S.C. §6335(a) of personal service of notice of seizure (or leaving the notice at the place of abode or business) before the IRS can obtain service through certified mail should be subject to strict compliance or should the requirement be subject to the substantial compliance standards found in 26 U.S.C. §6339(b)(2). This Court declined to certify the compliance standard issue.

C. Petitioner's Complaint as Governed by Merrell Dow.

The essence of Petitioners complaint is that a cloud of title is on its real estate title because Respondent acquired a quit claim of the property through an alleged tax sale wherein requirements for service of the notice of seizure were violated by the IRS thereby making the sale void *ab initio* and the subsequent quit claim deed provided by the IRS to Respondent also void *ab initio*. Thus, the complaint is one where the allegation of a federal requirement is the principal basis of the state cause of action.

Merrell Dow, supra, 478 U.S. at 808, was also a case in which a federal standard (requirement) was the principal basis for the state cause of action. The question considered in *Merrell* Dow supra 478 U.S. at 805, was,

> "The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the

> Constitution, laws, or treaties of the United States."

The holding in *Merrell* Dow supra 478 U.S. at 817, was,

> "We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States."

The *Merrell Dow* case and this case are virtually identical in principle. Petitioner alleged that the IRS violated the federal standard in 26 U.S.C. §6335(a) of not serving the owner of property with personal service (or leaving at the place or abode or business) of a notice of seizure. Congress has not provided a private quiet title action to remove a cloud on the title by a third party. *Merrell Dow* expressly holds that absent a private federal cause of action the mere presence of an allegation of the violation of a federal statute in a state complaint is not sufficient to usher in federal court jurisdiction through a substantial federal question. In this case the result should be the same as the one in *Merrell Dow*.

D. Analysis of *Merrell Dow* Refutes Respondent's Arguments.

1. Foundation of *Merrell Dow* Reasoning.

The standards and reasons that this Court used in *Merrell Dow* are inapposite to the reasoning of the Respondent it Merits Brief. In *Merrell Dow* this Court emphasized that, in addressing outer reaches of 28 U.S.C.

§1331, i.e. the question of federal jurisdiction and the 'arising under' language, the requirement of "sensitive judgments about congressional intent, judicial power and the federal system" were necessary, *Merrell Dow*, *id*, at 810. In order to render these judgments the proper conclusion necessarily depends on some combination of the following:

(1) "the plaintiff's are not part of the class for whose benefit the statute was passed;
(2) the indica of legislative intent reveal no congressional purpose to provide a private cause of action;
(3) a federal cause of action would not further the underlying purpose of the legislative scheme; and
(4) the respondent's cause of action is a subject traditionally regulated to state law, " *id*, at 810-811.

The Court noted that the factual elements in *Merrell Dow* presented the first case in which this Court reviewed a jurisdictional claim in light of the foregoing factors.

In reaching its final decision that absent a private federal action created by Congress there was no removal jurisdiction the Court examined previous case law. It initially considered *American Well Works Company v Lyne & Bowler Company*, 241 U.S. 987, 60 L.Ed 987, 36 S.Ct. 585 (1916), and the test Justice Holmes established for determining under what law a suit arises. His simple, but profound observation was, "A suit arises under the law that creates the cause of action." The Court, however, concluded that it was not an all inclusive test. The Court noted that in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9, 13 77 L.ED2d 420, 193 S.Ct. 2841 (1983), *id*, at 808. that a federal question may arise if there is a vindication of a right under federal law if that right turned on some construction of federal law. But, according to the Court "this statement must be read with caution," *id*, at 809.

The full statement in *Franchise Tax Board*, is

> "Our concern in this case is consistent application of a system of statutes conferring original federal-court jurisdiction, as they have been interpreted by this Court over many years. Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either, that the federal law creates the cause of action, or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law," *Franchise Tax Board*, 463 U.S. at 27-28

The Holmes analysis clearing indicates that the first standard does not apply because the compliant in both *Merrell Dow* and this case arose under state law. But it does not address the second standard where "The right to relief necessarily depends on resolution of a substantial question of federal law"

After determining that the second standard of a substantial federal question appearing in the well-pleaded complaint was the one before it, the *Merrell Dow* Court applied the four factors. In its view the Court stated the fact that "there is no federal private right of action thus cannot be overstated," *Merrell Dow*, supra 478 U.S. at 812. The ultimate conclusion was that creating a federal cause of action where there is none would 'flout' Congressional intent. Thus, the holding that absent a private federal right of action, the allegation of a violation of a federal statute in a state created cause of action is not sufficiently substantial to support substantial federal question jurisdiction removal from state court to federal court.

2. Arguments Contrary to *Merrell Dow.*

a. Application of *Franchise Tax Board.*

The Petitioner in *Merrell Dow* raised three arguments similar to the ones raised in this case by Respondent, the first two of which are similar to the ones argued by both the Respondent and the United States. The third is not applicable in this case. First, the argument was raised that the question before the Court was really a straightforward application of *Franchise Tax Board.* The Respondent in this case raised the virtually the same issue thought its reliance on the *Smith v. Kansas City Title & Trust Co.* 255 U.S. 180, 65 L.Ed 577, 41 S.Ct. 245 (1921) line of cases.

Merrell Dow addressed this argument by pointing out that the process of determining substantial federal question jurisdiction was a "selective process which picks out the substantial causes out of the web and lays the other ones aside," *Merrell Dow*, supra 478 U.S. at 815. As part of the 'selective process' the Court determined,

> "We simply conclude that the congressional determination that there should be no deferral remedy for the violation of this federal statute is tantamount to a congressional conclusion that that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction," *Merrell Dow*, supra 478 U.S. at 815.

In reaching this conclusion the Court in footnote 12, *id.* at 814, n12, effectively distinguished *Smith* on the basis that it was a question of the constitutionality of a federal statute. In other words, the 'selection process' used by the Court found that a constitutional question of a federal law

was consistent with a substantial federal question while an allegation of a violation of a federal law was not sufficient to be a substantial federal question jurisdiction.

The Respondent relies heavily in three cases, *Hopkins v. Walker*, 244 U.S. 486, 61 L.Ed 1270, 37 S.Ct. 711 (1917); *Smith v. Kansas City*, supra; and *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 100 L.Ed2d 811, 108 S.Ct. 2166 (1988). These are all in the same case line and are not applicable to this case by virtue of the holding in *Merrell Dow*. The *Smith* case is not applicable as shown above.

The *Hopkins* case is also not applicable to this case. *Hopkins* is a case in which the owners of a placer claim in Montana filed to remove a cloud on the title to their property for which a United States patent was issued to their predecessors. The owners had followed the mining laws of the United States and had obtained judgments affirming their ownership. Under a mistaken theory of the mining law adverse owners also applied for and received United States patents for the same property. The issue, and the facts surrounding it, concerning the conflict in the United States mining laws that resulted in two separate patents being placed on the same property was made part of the complaint.

The *Hopkins* case did not turn on its being a suit to remove title or a quiet title as the Respondent suggest, but on "the nature and validity of the plaintiff's title and the existence, invalidity, and recording of the defendants' certificates of location," *Hopkins*, supra, 244 U.S. at 489, which were a part of the complaint. As a result the court found that the case arose under the laws of the United States. This conclusion is consistent with the 'selective process' used by *Merrell Dow*. The allegation of a conflict between two federal statutes is a substantial question.

Respondent relies on the *Christianson* case, but that case did not deal with raising a violation of federal law to the status of a substantial federal question. In fact, in *Christianson* this Court found there was no jurisdiction for an appeal to the Federal Circuit because the patent law allegations were not included in each of the theories of antitrust claims as alleged by the petitioner. While these cases did correctly address various aspects of the "well-pleaded complaint' doctrine, they did not address the mere violation of a federal statute issue which are the focal point of both *Merrell Dow* and this case. Accordingly, any reliance by the Respondent on these cases and their subsequent lines is misplaced. It should be noted that the crux of the United States argument in it *amicus* brief revolves around the same line of cases.

b. Alleged Need for Federal Uniformity.

The second argument raised by the petitioner in *Merrell Dow* contended that there is a "powerful federal interest in seeing that the federal statute is given uniform interpretation. The Court dismissed such an argument by stating that "even if there is no federal district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action," *Merrell Dow*, supra 478 U.S. at 816.

This is the same argument the United States raised in its *amicus* brief. The United States position is undercut by three things, 1.) the position in *Merrell Dow* that the Supreme Court has ultimate appellate jurisdiction; 2.) case law of which an example is *Smith v. Industrial Valley Title Ins.*, 957 F.2d 90, 94 (3rd Cir. 1992) (following *Merrell Dow* and finding that Pennsylvania court were competent to interpret the Revenue Code); and 3.) the United States own position on 26 U.S.C. §6339(b)(2).

The *Smith v. Industrial Valley Title Ins.*, supra, is an excellent example of an appellate court correctly applying the requirement of a private right of action rule to a tax statute, by following *Merrell Dow* and finding no substantial federal question jurisdiction for removal purposes.

The United States also claims that it has a significant interest in the development of a uniform body of law. Because of this significant interest it believes that cases such as this one should be litigated in federal court to preserve that uniformity. While the United States appears to claim an interest in promoting uniformity through federal court litigation, its position is contrary to what it understands the mandate of Congress to be in 26 U.S.C. §6339(b)(2).

At page 26 in its *amicus* brief the United States clearly states its position,

> "In contrast, because Congress has *required federal tax sale requirements to be applied in state law quiet title actions*, see 26 U.S.C. §6339(b)(2), Congress's failure to create a federal cause of action to enforce the federal requirements is not evidence of the absence of a substantial federal interest in how those requirements are applied. To the contrary, the *very fact that Congress has mandated the application of federal requirements in state quiet title actions* establishes a substantial federal interest in actions that depend on the meaning or effect of those requirements." See United States *amicus* Brief, at page 26. (Emphasis added)

It is simply illogical for the United States to argue for a removal of a state quiet title action to federal court on the basis of a substantial federal question based on the

interpretation and effect of 26 U.S.C. §6339(b)(2) on section 6335 and maintain at the same time that Congress mandated the state courts to apply the federal law in state quiet title actions.

E. Respondent's Alternative Argument.

In its Summary of Argument at page 10 of its Brief the Respondent alternatively argues that Congress provided an express cause of action for which Petitioner could have pursued. Respondent later argued that 26 U.S.C. §7433 was an avenue by which Congress provided Petitioner with a private cause of action for damages. There are at least two reasons why the Respondent's assessment is incorrect.

First section 7433 provides a remedy for damages against the United States, but not for a quiet title action against a third party. There is nothing in the IR Code or US code that gives Petitioner the cause of action of quiet title against another private party. This can only be done through state law. There is at least one district court case that indicates there is no federal remedy for a violation of section 6335. In *Little River Farms, Inc. v. United States*, 328 F.2d 476, 479 (ND Georgia, 1971). That court found that the owner under section 6335 has no way to enforce a violation under section 6335, except for 28 U.S.C. §2410. This is a private suit between two parties over property which the United States has stated it has no interest. Thus, Section 2410 is not applicable here because the quiet title is against the United States which must claim an interest in the property.

Second, assuming *arguendo*, a suit for damages would satisfy the requirement of a private cause of action in this case, it still is inapplicable. Even if Congress did create a private federal action the lower courts have consistently held that if the plaintiff is barred from pursuing the action, either substantively or procedurally there is no federal jurisdiction

over a state cause of action based on a violation of that law, see *Dixon v. Coburg Dairy, Inc.* 369 F.3d 811 (4th Cir, 2004); *Jairath v. Dyer*, 154 F3d 1280, 1283 & n9 (11th Cir. 1998); *Seinfeld v. Austin*, 39 F.3d 761, 764 n3 (7th Cir. 1994); and *Mulcahy v. Columbia Organic Chem. Co.*, 29 F.3d 148, 152 (4th Cir. 1994). In essence, these cases say that if the federal private right of action is unavailable for any reason, a private federal cause of action under *Merrell Dow* does not exist. Section 7433(d)(3) provides for a two year statute of limitations. Thus, the private right of action advocated by the Respondent does not exist in this case.

Furthermore, assuming one again *arguendo*, the case law is clear that the federal remedy must match the remedy sought, see *Mulcahy*, supra, 29 F. 3d at 152-53 (federal remedy available did not provide the requested monetary damages so "a private cause of action under Merrell Dow does not, in truth, exist"); *Wander v. Kaus*, 304 F. 3d 856, 859 (9th Cir. 2002) (remanding claim for damages under a state law which incorporated a violation of the federal Americans with Disabilities Act as a violation of state law, because the only federal remedy available was for injunctive relief rather than compensatory damages); *Jairath*, supra, 154 F. 3d at 1284; *Handyman Network, Inc. v. Westinghouse Savannah River*, 868 F.Supp. 151, 154 (D.S.C. 1994) (Remanding state tort and contract claims premised on violations of federal wage and benefits laws and seeking compensatory damages, noting that no private federal remedy for compensatory damages is available); and *In re Wireless Telephone Radio Frequency Emissions Products Liab. Litig.*, 327 F. Supp. 2d 554, 558-59 (D. Md. 2004) (noting no federal remedy available to plaintiffs providing requested monetary damages for personal injuries and remanding to state court).

H. Conclusion.

The Petitioner filed a complaint in state court merely alleging a violation of 26 U.S.C. §6335(a), hence a need to interpret the statute. In so doing Petitioner did not allege that the statute was unconstitutional, that it was invalid, nor that it was in conflict with another federal statute. By merely alleging a violation of federal law Petitioner did not invoke the substantial federal issues of constitutionality and statutory conflicts which the *Smith v. Kansas* line of cases address. Rather it placed its complaint squarely within the parameters meant to be resolved by *Merrell Dow as* the 3rdCircuit has held in *Smith v. Industrial Valley*.

Both the District Court and the 6th Circuit found federal jurisdiction by violating the requirement of a private federal right of action. The holding in *Merrell Dow* is clear and unequivocal. When there is an allegation of a violation of a federal statute in a state cause of action there must be a private federal remedy provided by Congress. If there is not, there is no federal jurisdiction through substantial federal question jurisdiction. This case has the same elements, an allegation of the violation of a federal statute 26 U.S.C. §6335(a)) and no private right of action to enforce that violation. Thus, substantial federal question jurisdiction should be denied as it was in *Merrell* Dow. The decision of the 6th Circuit must be reversed with the case being remanded back to the district court with instructions to remand the case to the Michigan courts where the quiet title action belongs.

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Respectfully submitted,
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